Circuit Court for Montgomery County
Case No. 134524C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 795

September Term, 2019

DANILO ENRIQUEZ NUNEZ

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: March 1, 2021

A jury of the Circuit Court for Montgomery County convicted Danilo Enriquez Nunez of second-degree rape and third-degree sexual offense. The court sentenced him to twenty years' imprisonment for second-degree rape, with all but twelve suspended, and a concurrent term of five years for third-degree sexual assault, all of which the court suspended, to be followed by five years' probation. On appeal, Nunez presents two questions for our review, which we have rephrased slightly:[1]

> 1. Did the trial court abuse its discretion in limiting the cross-examination of the primary investigating police officer?
>
> 2. Did the trial court commit reversible error by overruling defense counsel's objections to remarks made by the State during its rebuttal closing argument?

Because our answer to the first question is yes, we will reverse the convictions.

Background

Nunez does not challenge the legal sufficiency of the evidence. Accordingly, we will recite only those facts, viewed in the light most favorable to the State, necessary to give context to our discussion of the parties' appellate contentions. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

[1] In his brief, Nunez sets out the issues as:

1. Did the trial court err in limiting the cross-examination of a State witness?
2. Did the trial court err in allowing the prosecutor to make improper and prejudicial comments at closing argument?

We will refer to the victim in this case as "V."[2] At the times relevant to this appeal, she was thirteen years old. Nunez first met V. at church in early January 2018. On or around June 11th of that year, Nunez began sending V. messages via "Snapchat."[3] Initially, V. communicated with Nunez using her pink iPhone. When her father confiscated that device, V. continued to access her Snapchat account, first by means of her brother's iPhone, and then by using a silver-colored iPhone given to her by Nunez. According to Snapchat's records, Nunez and V. exchanged 277 Snapchat messages between June 11th and July 4th, 2018.

At trial, V. testified that on or around June 25th, Nunez drove his blue Subaru automobile to V.'s home in Montgomery County, where she resided with her father, mother, uncle, aunt, and two cousins. After picking her up, Nunez drove V. to a Virginia movie theater, where they watched a movie. Then they returned to the garage wherein Nunez had parked his blue Subaru. Upon their entering his vehicle, Nunez engaged in sexual intercourse with V.

V. testified that she was sexually assaulted by Nunez on a second occasion. Shortly after the first assault, Nunez met V. at a parking lot near her home. While in his vehicle,

[2] The initial is chosen at random. Neither the victim's first name nor her surname begins with the letter "V."

[3] "Snapchat" is a multimedia messaging application for smart phones, which permits users to exchange text messages, pictures, and videos. Snapchat is unique among messaging applications in that images and messages exchanged by its users expire and are automatically deleted shortly after having been viewed unless a recipient deliberately saves them.

Nunez first engaged in sexual contact and then in sexual intercourse with V. After that assault, V. returned home, whereupon her parents discovered the silver iPhone that Nunez had given her. After they had done so, V. told her uncle that she had been inappropriately touched. The uncle told V.'s father of the assault, who promptly called the police. The police were contacted on July 3, 2018.

The day after informing V.'s father that she had been sexually assaulted, her uncle encountered Nunez, whom he knew through church. Accompanied by a church pastor, V.'s uncle spoke with Nunez's wife, after which Nunez tearfully "asked [him] for forgiveness."

On July 10th, Montgomery County Detective James Kafchinski interviewed V. and her father. Detective Kafchinski also retrieved V.'s pink iPhone, the silver iPhone given to her by Nunez, and Nunez's own mobile phone. A search of the silver iPhone revealed that Nunez's telephone number had been saved as a "contact" therein. The subscriber information for that phone indicated that it was registered in the name of Nunez's father-in-law. Moreover, the mailing and e-mail addresses on that account matched those corresponding to Nunez's telephone number. A search of the cell phones' call logs revealed that four calls had been exchanged between the silver phone and Nunez's phone on the evening that the police were notified of the assaults.

The police obtained search warrants for V.'s and Nunez's Snapchat accounts. Those records revealed the 277 messages that had been exchanged between Nunez and V. The content of only one such message had been preserved. That message was sent from

Nunez's account to V.'s account at 8:21 p.m. on July 3rd—the date on which V.'s father contacted the police—and read: "What happened?" The search of Nunez's account also revealed a photograph of a blue car, which, at trial, V. identified as the vehicle in which Nunez had twice assaulted her. V.'s aunt, in turn, testified that she had seen V. speaking with an older man outside of that vehicle at around 9:00 a.m. approximately two weeks prior to July 3rd. Detective Kafchinski was, however, unable to identify the car or to obtain its tag information. Accordingly, he neither processed the vehicle for fingerprints nor tested it for DNA. Nor did he recover the clothing that V. was wearing when she was assaulted for DNA analysis. V. was examined by a physician about a month after the assaults occurred. The parties stipulated that the forensic medical evidence was inconclusive as to whether V. had engaged in sexual intercourse.

During its case-in-chief, the State elicited testimony in support of the facts recited above. The State proffered Detective Karen Carvajal as an expert witness in the field of "digital forensics." Nunez did not object, and the detective testified about the results of her examination of the mobile phones and the Snapchat account that we have previously summarized. The State did not introduce any other forensic evidence. Nunez did not take the stand but called three witnesses who testified as to his good character.

Nunez contends that the court erroneously restricted the scope of defense counsel's cross-examination of Detective Kafchinski, thereby unfairly restricting his ability to impeach the detective's credibility and to challenge the adequacy of his investigation. His argument focuses on a general order of the Montgomery County Police Department,

which is referred to by the parties as "Function Code No. 616." This order sets out requirements and procedures for the investigation of sexual assaults. Among other things, Function Code No. 616 directs that "the victim is the primary crime scene." Therefore, investigating officers are to encourage victims of sexual assaults not to "bathe, change clothing, or use bathroom facilities" until a sexual assault forensic examination is carried out by a qualified sexual assault nurse examiner or forensic nurse examiner. Officers are to recover clothing worn by the victim when the assault occurred so that it can be examined for forensic evidence. Additionally, when a sexual assault is alleged to have occurred within a vehicle, officers are directed to preserve the vehicle "for complete processing (photographing, recovery of latent prints, hair, fibers, DNA, and bodily fluids)."

The defense adopted a tripartite trial strategy whereby it sought: (i) to impeach V.'s credibility, (ii) to challenge the adequacy of the police investigation, and (iii) to argue that, had the investigation been more thorough, forensic evidence would have been recovered that would have exonerated Nunez. He claims that, in order to demonstrate the investigation's purported inadequacy, "the cross-examination of [Detective] Kafchinski was the vehicle [whereby] to drive that point home to the jurors." During his cross-examination of Detective Kafchinski, defense counsel elicited testimony indicating that his investigation was not as thorough as it might have been. Specifically, Detective Kafchinski testified that:

1. Although the clothes that V. had worn on the day of the July 3rd sexual assault could have contained DNA evidence, he did not seize any of her clothing;

2. He did not obtain biological material directly from either V. or Nunez;

3. He did not examine V. for fingerprints; and

4. Because he was unable to identify or locate Nunez's automobile, he neither processed it for fingerprints nor tested it for DNA.

After eliciting this testimony, defense counsel asked Detective Kafchinski if he was familiar with Function Code No. 616. The State objected, and the court sustained. During an ensuing bench conference, the following occurred (emphasis added):

> [DEFENSE COUNSEL]: In this order 646 [sic], this is a … law enforcement directive (unintelligible) sex assault … law enforcement officers that investigated sex offenses. Police order 646 [sic] directs all sex offense investigators to seize …. [a]ll biological material, including the clothing of the victims of sex assault, except --
>
> THE COURT: Okay. I . . . get your point.
>
> [DEFENSE COUNSE]: So --
>
> THE COURT: So, he, he violated --
>
> [DEFENSE COUNSEL]: That regulation.
>
> THE COURT: Okay. And that's something you could take up with an internal investigation to have him disciplined, or sanctioned, or something else, *but it's irrelevant, it's irrelevant for this case, the same as it would be irrelevant if in fact the State were to ask him if he complied with every condition in the handbook as to corroborate, or accentuate, or dramatize what a great investigation he did*.
>
> With the investigation having the rules are irrelevant to the, it's not admissible, it's what somebody else wrote under the regulations for those,

and *whether he does it or doesn't do it is irrelevant in a trial of this case*. You pointed out things that he didn't do, but I'm not going to allow you to indicate a violation of a … regulation is therefore a dereliction of duty, because then it, it basically tells the jury, it translates into since he didn't do things in the handbook therefore he's deficient, and therefore the Defendant should be acquitted, which is not the case at all.

He could not do anything in the handbook, and it can be pointed out in cross, but the jury's not going to be instructed that it's a violation, for example, like in a motor vehicle case where you've got a violation of a rule of the road, that's evidence of negligence. We're not dealing with negligence here, we're dealing with things that are in the handbook, and it would be the same as if it says you need to respond to the scene within 24 hours, and somebody comes like 30 hours later, that may be a violation of internal policy, but it's not admissible in an evidentiary issue with respect to giving the jury the impression that therefore somehow what he did was deficient. So, I'll sustain the objection with respect to what's in the handbook.

[DEFENSE COUNSEL]: And it's not [a] handbook, sorry, Your Honor, to correct --

THE COURT: Pardon?

[DEFENSE COUNSEL]: [I]t's a general order.

THE COURT: A general order.

[DEFENSE COUNSEL]: Yes, and I would proffer --

THE COURT: But this is published by the police department?

[DEFENSE COUNSEL]: Correct. And I would proffer that the harm to my client is that I won't be able to impeach this witness with a general order that mandates this officer to seize the … evidence is not just a --

THE COURT: *[T]hat may be a preferred policy, it might be an ideal situation, but I'm not going to find that … it equates to inadmissible evidence, or a deficient investigation, and that's what the impression we would be giving the jury, if he didn't do certain things in the handbook, or*

> *the orders.* The same with the body camera, the body worn camera, sometimes they have it on, sometimes they don't. Now there [are] regulations on it, and an attorney can ask the witness did you have the ability to turn it on, did you not turn it on, did you turn it off, the jury can draw whatever conclusion they want on that, but to say that they need, that he violated an internal policy somehow indicates that the cop is being devious or deceptive or dishonest, that's the problem. That's why I'm ruling that way.

After Detective Kafchinski finished testifying, the court explained to counsel that, even if the evidence as to the detective's failure to comply with Function Code No. 616 was relevant, the probative value of such evidence would be substantially outweighed by the danger of both unfair prejudice and misleading the jury. For the latter two reasons, the court ruled that the proffered testimony was inadmissible under Maryland Rule 5–403. Specifically, the court stated:

> [A]s I indicated at the bench I believe that [the jurors] would find that … a policeman violated an order from the department that therefore it would taint the investigation that he did perform, and I don't believe that's a logical conclusion, and not one that they should be instructed to be the law.
>
> In other words, [the jury] can draw whatever conclusions they want based on a cross-examination of things that were not done, but to give it the imprimatur that the police department, that he violated a standard of the police department makes it look somewhat as if he [was] deficient or deceptive, and his reasons for not doing certain things may be exceptions to the order[.] I don't want to have a battle of the experts[.] I don't want to have people come in here and say well, if he had done this he might have found that, that would be too collateral. But, so I found that initially it's irrelevant, but if found to be … relevant I believe for the reasons I stated under [Md. Rule 5–403] it should [not] be admitted.

Analysis

The parties' contentions invoke two closely-related concepts. The first is whether evidence regarding Function Code No. 616 was relevant, that is, whether it had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. The second is whether, in the context of V.'s trial, relevant evidence regarding Function Code No. 616 should have been excluded because the probative value of that evidence was

> substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Md. Rule 5-403.

Whether evidence is relevant is a question of law and appellate courts exercise de novo review over a trial court's relevancy determination. *See, e.g.*, *State v. Simms*, 420 Md. 705, 724–25 (2011). However, a trial court's decision to exclude relevant evidence on the grounds that its probative value is outweighed by the possibility of unfair prejudice, jury confusion or other concerns is reviewed for abuse of discretion. *Id.* at 725. The standard of review for discretionary decision by trial courts is well-established:

> [A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically

> follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.

North v. North, 102 Md. App. 1, 14 (1994) (internal quotation marks omitted).

A.

To this Court, Nunez contends that:

> Function Code No. 616 prescribes the procedures to be taken by officers in investigating rapes and sexual offenses. Included in those regulations, *inter alia*, are requirements to preserve a vehicle for complete processing if the crime occurred inside; to collect all items of clothing worn at the time of the assault; and, if necessary, to transport the Victim to the hospital where a medical examination can be conducted. The officer's failure to follow departmental policy with respect to investigation of sexual offenses demonstrates the extent of the deficiency of the investigation and is absolutely relevant to the assessment of the officer's credibility and the reliability of the investigation conducted in this case.

In its brief, the State acknowledges that "a defendant may challenge the thoroughness and adequacy of a police investigation, and that a failure to follow standard procedures may be relevant to such an attack." *See Wise v. State*, 132 Md. App. 127, 136 (2000) ("The failure of the police to follow protocol or, even without a General Order, to refuse to look for fingerprints is a proper and legitimate defense tactic for attempting to create reasonable doubt[.]" (citation omitted)); *Bailey v. State*, 63 Md. App. 594, 608–11 (1985) (holding that proffered testimony pertaining to the State's failure to follow standard

forensic procedures was relevant to the defendant's prosecution).[4]

That there were specific Montgomery County Police Department protocols for obtaining and preserving physical evidence of sexual assaults made it more probable that the investigating officers' failure to obtain and preserve such evidence undermined the validity of their investigation. Even if the jurors might have been able to figure some of these things out for themselves, Function Code No. 616 would have given them an objective standard to gauge the thoroughness of the police investigation and the validity of its results. Nunez had the right to present this evidence to the jury and the trial court erred in excluding it on the grounds of relevancy.

B.

This brings us to the State's harmless error argument. In the State's view, the court would not have abused its discretion had it declined to admit the evidence as to Function Code No. 616's requirements because the probative value of that evidence would have been outweighed by possible prejudicial effects.

[4] Maryland appellate courts have reached similar conclusions in other contexts. *See, e.g.*, *Boyer v. State,* 323 Md. 558, 590–91, 594 A.2d 121 (1991) (holding that failure to comply with department regulations relevant as to whether police officer breached duty of care by engaging in a high-speed chase in a negligence action*); Mayor & City Council of Baltimore v. Hart*, 167 Md. App. 106, 122 (2006) (same); *State v. Albrecht,* 336 Md. 475, 502–05 (1994) (holding that evidence that police officer failed to comply with departmental guidelines for the use of firearms was relevant in involuntary manslaughter case).

As discussed above, after it had sustained the State's objection on the ground that evidence as to Function Code No. 616 was irrelevant, the trial court commented that, even if it were relevant, presenting such evidence to the jury posed unacceptable risks of unfair prejudice and juror confusion. The State places great weight on this part of the trial court's analysis, arguing that we should treat the court's discussion as an alternate basis for its decision and review it under the abuse of discretion standard. The State then explains that, even though Nunez was precluded from questioning the detective about Function Code No. 616, counsel was nonetheless able to elicit a great deal of information from Detective Kafchinski regarding problems with his investigation.[5] Additionally, V. testified that, although the police sent her to a clinic sometime after the day of the second assault, she could not remember if DNA samples were taken from her. The State posits that the jury could have surmised from this evidence that the police investigation of this case was problematic and that these conclusions "were matters of common sense."

Finally, the State correctly points out that Nunez did not address the trial court's Rule 5-403 unfair prejudice analysis in his brief. Therefore, reasons the State, Nunez has failed to demonstrate that the trial court committed an abuse of discretion in refusing to permit

[5] Specifically, the State points to responses by the detective on cross-examination that he was not able to identify Nunez's car and, as a result, there were no fingerprints or DNA obtained from it; he did not obtain "biological material" directly from V. and was not aware that any other officer had done so; he did not obtain "biological material" from appellant; he did not take any fingerprints from V.; he did not seize any of V.'s clothing; V.'s clothing could have been a significant source of DNA; and in his experience, a sexual assault victim's clothing is capable of retaining DNA material.

him to cross-examine Detective Kafchinski about Function Code No. 616 and its requirements.

There are two independently fatal problems with the State's analysis.

The first is that the State's argument is somewhat contrafactual—the trial court did not exclude the Function Code No. 616 evidence on the grounds of unfair prejudice, confusion of the issues or any of the other grounds set out in Rule 5-403. The basis of the court's decision was its conclusion that the evidence was irrelevant as a matter of law. The court made its Rule 5-403-related comments only after defense counsel had finished his cross-examination of Detective Kafchinski. But by then the horse was out of the barn. We think it is more appropriate to view the trial court's Rule 5-403 analysis as an attempt to show why, if its actual ruling was in error, the error was harmless. We do not criticize the court for making the effort, but it is our role, and not the trial court's, to determine whether a trial error is harmless. And that assessment must be made on the entire trial record, and not just on what had occurred up to the time that the court made its additional comments.[6]

The second problem with the State's argument is that the grounds marshaled by the State in its brief as to why the court's Rule 5-403 analysis was reasonable have very little

[6] Thus, under the facts of this case, the State's contention that we should affirm the convictions because appellant failed to show that the trial court abused its discretion is not consistent with the rule that where there is error in a criminal trial, prejudice is presumed and it is the State's burden to prove the absence of prejudice beyond a reasonable doubt.

to do with the grounds actually articulated by the trial court in its probative value/prejudicial effect analysis. It is true that the court alluded to at least some of the factors cited by the State in explaining why it thought that evidence as to Function Code No. 616 was irrelevant. But these were not the grounds articulated by the trial court in its explanation of why the prejudicial effect of evidence about Function Code No. 616 would outweigh its probative value. To reiterate, those grounds were (1) it would be "illogical" for jurors to conclude that the officer's investigation was "taint[ed]" because the officer had failed to follow departmental protocols regarding sexual assault investigations, (2) informing the jury of Function Code No. 616 would give an "imprimatur" to defense counsel's argument that Detective Kafchinski's investigation was "deficient or deceptive," (3) informing the jury of Function Code No. 616 would result in a "battle of the experts" as to whether the investigation complied with the requirements of the order, and (4) the court did not want "people com[ing] in here and say[ing] if [Detective Kafchinski] had done this, he might have found that" because such testimony or argument "would be too collateral."

Assuming for purposes of analysis that the trial court's Rule 5-403 comments should be treated as an independent basis for excluding evidence as to Function Code No. 616, the proper focus of the abuse of discretion analysis is on the reasons actually articulated

by the court as opposed to the grounds posited by appellate counsel.[7] With this in mind, we conclude that the trial court would have abused its discretion had it based its decision to exclude the Function Code No. 616 evidence on the grounds that its probative value was outweighed by its prejudicial effects.

We cannot agree with the trial court's concern that it would be illogical for the jury to conclude that Detective Kafchinski's investigation was deficient because he and other officers had failed to follow departmental protocols. In our view, jurors could reasonably conclude that officers' failures to do what their department has told them should or must be done undermined the validity of the police investigation. This is why the Court of Appeals and this Court have held that such evidence is relevant in the first place. For the same reason, evidence that that Function Code No. 616 would support[8] defense counsel's argument that the police investigation was deficient is not a reason to bar admission of evidence about the order.

[7] We recognize that the trial court *could have* relied on the grounds set out in the State's brief to support the court's conclusion that the probative weight of the evidence was outweighed by its prejudicial effects but the fact remains that the court did not do so. If we accept the State's reasoning as to why the convictions should be affirmed, we would in effect be exercising the trial court's discretion for it and for reasons different from those identified by the trial court itself. This is not the role of an appellate court. *See Bodeau v. State*, 248 Md. App. 115, 154 (2020) ("Our task is to review the circuit court's exercise of . . . discretion for abuse—not to exercise that discretion on the circuit court's behalf.").

[8] The trial court used the term "imprimatur."

We also believe that the court's concern about opening the door to expert testimony was misplaced in the present case. Nunez never proposed to call an expert witness and the only expert witness to testify for the State was Detective Carvajal, who testified about what was recovered and not recovered from the various mobile telephones used by V. and Nunez.[9] Moreover, expert witnesses often testify in cases as to whether actions of law enforcement officers were either consistent with, or in violation of, departmental regulations and protocols. *See, e. g*., *State v Pagotto*, 361 Md. 528, 539 (2000); *State v. Albrecht*, 336 Md. 475, 489–93 (1994). Rule 5-403 does not bar the admission of evidence because expert witnesses may be of assistance to juries in interpreting it.

Finally, we do not agree with the court's concern that the evidence should be excluded because defense counsel might argue to the jury that "if [Detective Kafchinski] had done this he might have found that" was "too collateral." Assuming for purposes of analysis that such an argument would have been improper, that counsel *might* make an improper argument to the jury is not a basis to exclude otherwise admissible evidence. Improper closing argument can be remedied when and if it occurs.

For these reasons, we conclude that the trial court's error in sustaining the State's objection to introduction of evidence about Function Code No. 616 was not rendered harmless by the court's subsequent Rule 5-403 analysis.

[9] The State was prepared to call the physician who examined V. but the parties entered a stipulation as to the substance of her testimony.

There is a broader context to our concerns about the trial court's ruling that the evidence of the violations of Function Code No. 616 was inadmissible. Function Code No. 616 does not merely *recommend* that investigating officers take steps to increase the likelihood that relevant evidence, especially DNA and fingerprint evidence, is recovered in sexual assault cases. The order unambiguously *requires* them to do so. Police general orders of this nature are analogous to the Maryland Rules, which are not suggestions or aspirational recommendations but rather "precise rubrics" that courts and litigants are required to follow. *See, e.g.*, *State v. Graves*, 447 Md. 230, 241 (2016); *Laser Womack v. State*, 244 Md. App. 443, 451 (2020) (citing *Parren v. State*, 309 Md. 260, 280 (1987). The public interest is not served by a blanket rule that prevents juries from learning of the existence and substance of such regulations on relevancy grounds.[10] Whether the prejudicial effect of such evidence outweighs its probative value in a given case is entrusted to the discretion of the trial court, but the scope of that discretion is finite, and the reasons relied upon by the court must have a "reasonable relationship to its announced objective." *North*, 102 Md. App. at 14.

Conclusion

An error by a trial court in a criminal case is presumptively prejudicial. Reversal is required unless the State demonstrates that the error is harmless beyond a reasonable

[10] There is nothing that prevents prosecutors from eliciting evidence that compliance with the mandates of Function Code No. 616 would be impracticable or impossible in a specific case.

doubt. *Dionas v. State*, 436 Md. 97, 107–08 (2013). For the reasons that we have explained, the State's harmless error argument is not persuasive. We will reverse the convictions and remand this case for a new trial.[11]

THE JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY ARE REVERSED AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MONTGOMERY COUNTY.

[11] In his brief, Nunez also argues that his convictions should be reversed because of what he asserts was improper closing argument by the prosecutor. It is not necessary for us to address this contention in light of our reversal of the convictions based on his primary argument.